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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID SCOTT HARRISON, Plaintiff and Appellant, v. SAN DIEGO COUNTY THE DISTRICT ATTORNEY, Defendant and Respondent.	D068603 (Super. Ct. No. 37-2014-00021964-CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed in part and reversed in part.

David Scott Harrison, in pro. per., for Plaintiff and Appellant.

Thomas E. Montgomery, County Counsel, Thomas D. Bunton, Deputy County Counsel, for Defendant and Respondent.

David Scott Harrison filed a petition for writ of mandate to compel the San Diego County District Attorney (the District Attorney) to comply with his request under the California Public Records Act (Gov. Code, § 6250, et seq. (CPRA)). After the District Attorney produced the only document in its possession responsive to Harrison's request,

it asked him to dismiss the petition, but he refused, and the petition proceeded to trial. The court entered judgment in favor of the District Attorney, and awarded it costs. Harrison filed a timely appeal and argues (1) costs to the District Attorney could only be awarded if his action was frivolous and there is no substantial evidence to support that conclusion, and (2) he was the prevailing party entitled to a cost award.

FACTUAL BACKGROUND

On May 1, 2014, Harrison served the District Attorney with his CPRA request seeking (1) a letter filed in a trial court action, but sealed by an order entered by a San Diego Superior Court judge, and (2) the envelope in which it was sent. The District Attorney initially replied (1) the requested documents appeared to have been part of its investigatory files that were exempt from CPRA disclosure requirements (citing Gov. Code, § 6254, subd. (f)), and (2) the requested documents appeared to have been sealed by court order and only the court could unseal documents in its possession. Harrison then renewed his request and expanded it to include any documents presented by the District Attorney to the court for purposes of sealing the letter. Six weeks later, when the documents had not been turned over, Harrison filed the underlying petition to compel the District Attorney to provide those documents to him.

Shortly before Harrison filed this action, an opinion from an appellate court became final that determined, in essence, that any document filed with a trial court becomes a public record and is not exempted from disclosure by Government Code section 6254, subdivision (f), merely because copies are also contained in investigatory files maintained by the state. (See *Weaver v. Superior Court* (2014) 224 Cal.App.4th

746.) Because of this case, the District Attorney informed Harrison it was withdrawing its Government Code section 6254, subdivision (f), objection, but reiterated the document was still under seal and therefore could only be released by court order. The District Attorney sought and obtained an order from the trial court unsealing the document for the limited purpose of providing it to Harrison, and provided it to him. The District Attorney also informed Harrison that, because it had now complied with his CPRA request by providing the only responsive document in its possession, he should dismiss his petition.

Harrison instead elected to proceed with his petition. Six months after the District Attorney provided the letter to Harrison, the court heard the petition and found the District Attorney had already provided all documents in its possession that were the subject of Harrison's CPRA request. The court entered its judgment denying Harrison's petition and awarding costs to the District Attorney.

The District Attorney filed a memorandum of costs seeking $435.00 as costs. Harrison then filed an "Opposition to Respondent's Request for Costs And Fees [and] Counter Request for Costs and Fees," asserting (1) he (rather than the District Attorney) was the prevailing party entitled to costs, and (2) the District Attorney could not recover costs because his action was not frivolous. The court, after considering Harrison's opposition, ruled in the District Attorney's favor.

ANALYSIS

A. Legal Framework

The CPRA contains specific provisions with respect to the award of court costs. Government Code section 6259, subdivision (d), provides "[t]he court shall award court

costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section." In contrast, public agencies such as the county are ordinarily not entitled to attorney fees and costs from a requestor who fails to secure public documents in a court challenge based on a CPRA request. However, a public agency may recover its costs if the trial court "finds that the plaintiff's case is clearly frivolous." (*Ibid*.)

Our review of an order awarding costs to the public agency, based on an express or implied finding the action was frivolous, involves a mixed standard of review. "Generally, we review an award of fees and costs by the trial court for abuse of discretion. [Citation.] 'However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law. [Citations.]' [(Quoting *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)] . . . [W]e must determine whether the action totally lacked merit, i.e., that any reasonable attorney would agree it lacked merit. [Citation.] Consequently, we independently review [a] challenge to the legal basis for the attorney fees and costs award. [Citations.] However, factual findings made by the trial court are upheld if they are supported by substantial evidence." (*Crews v. Willows Unified School Dist.* (2013) 217 Cal.App.4th 1368, 1379.)

B. Analysis

Harrison first argues there is no substantial evidence to support the award because his CPRA petition caused the District Attorney to release one of the documents sought by

his petition, making him the prevailing party, and therefore he should have recovered costs.[1] Moreover, Harrison argues the fact he was the prevailing party at a minimum precluded the court from finding his action frivolous.

The "Prevailing Party" Claim

Certainly, "[a] plaintiff prevails within the meaning of [Government Code] section 6259, subdivision (d), ' "when he or she files an action which results in defendant releasing a copy of a previously withheld document." [Citation.]' (*Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1391 . . . ; [citation].) An action under the Public Records Act results in the release of previously withheld documents 'if the lawsuit motivated the defendants to produce the documents.' (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 482 . . . .)" (*Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1085.) Harrison asserts that, because the District Attorney provided the letter after the petition was filed, he prevailed in the action.

However, Harrison's argument that he was necessarily the prevailing party fails because it is based on the logical fallacy (expressed as "post hoc ergo propter hoc") that merely because the release of the letter *followed* the filing of his petition, the release was

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1 We reach this issue because, although Harrison did not timely file a cost bill as prevailing party, he did seek leave to file a late cost bill, the District Attorney did not object on timeliness grounds, and the trial court could have granted that request. (See *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 155.) Whether Harrison was the prevailing party is relevant both to his claim the trial court erred when it denied his request for costs, and to whether the trial court erred when it awarded the District Attorney its costs.

necessarily *caused* by the filing of his petition. The courts have recognized the fallacy of this argument. (See, e.g., *Rogers v. Superior Court, supra,* 19 Cal.App.4th at pp. 482-483 [fees denied because agency voluntarily disclosed records in response to the pertinent request and additional documents were produced after lawsuit filed simply because additional city department was searched].) For example, in *Motorola Communication & Electronics, Inc. v. Department of General Services* (1997) 55 Cal.App.4th 1340, the court upheld the trial court's refusal to find the requestor was the prevailing party because, although the documents were released after the petition was filed, there was some evidence to support the implied finding of the trial court that the delay was attributable to the mechanics of obtaining the documents rather than to a refusal to produce those documents. The *Motorola* court reasoned the fact the documents were produced *after* the petition was filed did not necessarily demonstrate the documents were produced *because* of the pending petition. (*Id*. at pp. 1347-1351.)

Here, there is substantial evidence to support the implied finding of the trial court that the District Attorney did provide the letter to Harrison, albeit after his petition was filed, but that the delay was attributable to the fact the letter had been ordered sealed by a court rather than because the District Attorney was refusing to produce it or was only producing it because of Harrison's petition.[2] Because substantial evidence exists to

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[2] When the District Attorney produced the letter on December 22, 2014, it explained to Harrison that the District Attorney did not claim (in light of recent court rulings) the letter was protected from disclosure, but that "[b]ecause the . . . letter was sealed . . . the District Attorney could not provide it to you. It is normally the responsibility of the person seeking a document to ask the court to unseal it." However, the District Attorney

support the implied finding that his petition did not cause the District Attorney to produce the letter, we reject Harrison's claim the trial court was required to find he was the prevailing party.

The "Frivolous" Claim

Harrison also asserts that, because the District Attorney *did* turn over the letter in December 2014, his action cannot be deemed frivolous for purposes of the cost award in favor of the District Attorney.

The District Attorney concedes the petition "was not frivolous when it was commenced." However, it cites cases stating generally that "an action which is not necessarily frivolous when begun may become so later" (*Dunn v. Jurupa Unified School Dist.* (2000) 79 Cal.App.4th 957, 962) to argue there was evidence from which a trial court could conclude Harrison's action *became* frivolous after December 22, 2014, because Harrison declined the District Attorney's demand to dismiss the petition after it turned over the letter on December 22, 2014.

We are unpersuaded by the District Attorney's argument because the only costs it sought, and were awarded by the court, was the filing fee incurred to oppose the petition. That cost was incurred in October 2014, and hence was incurred at the time when, according to the District Attorney's own concession, the action was *not* frivolous. Even assuming Harrison's petition at some later time changed from a potentially meritorious

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went on to explain that, because "it would require an additional delay for you to request the court to unseal the . . . letter, the District Attorney's Office asked [the court] to unseal the record for the limited purpose of providing a copy to you" and "[t]he court agreed to do so . . . ."

action and became frivolous, the District Attorney cites no authority suggesting it was entitled under Government Code section 6259, subdivision (d), to recover the costs it incurred during the period when the action *was* meritorious, and analogous authority suggests such sanctions should be limited to the costs incurred during the period in which the action was frivolous. (See *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 879-880 [amount of attorney fees incurred by judges defending frivolous action were properly assessed except to the extent that award for one judge included amount for defending a cause of action that could not yet be determined to be frivolous].) We therefore conclude the award of costs to the District Attorney, insofar as such costs were incurred when Harrison's action remained meritorious, was error.

DISPOSITION

The judgment, insofar as it awarded costs to the District Attorney, is reversed; in all other respects the judgment is affirmed. Each party shall bear its own costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.